SUPREME COURT, U. S.

FILED

MAR 5 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1203

VICTOR MADERA, RAMIRO MADERA, MANUELA MADERA, and all other persons similarly situated,

Petitioners,

—v.—

BOARD OF EDUCATION OF THE CITY OF NEW YORK, BERNARD E. DONOVAN as Superintendent of Schools of the City of New York, THERESA RAKOW as District Superintendent of Public Schools for District One in the City of New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

—v.—

BOARD OF EDUCATION OF THE CITY OF NEW YORK, BERNARD E. DONOVAN as Superintendent of Schools of the City of New York, THERESA RAKOW as District Superintendent of Public Schools for District One in the City of New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on December 6, 1967.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 386 F. 2d 778 (1967) and is set forth in Appendix A, *infra*, pp. 1a-24a. The opinion of the District Court is reported at 267 F. Supp. 356 (1967) and is set forth in Appendix B, *infra*, pp. 25a-67a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered December 6, 1967. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254 (1).

Question Presented

At a hearing to be held at district headquarters before a District Superintendent of the New York City public schools a decision was to be made whether to continue the suspension of a pupil indefinitely, return him to school, transfer him to an educationally inferior school for disorderly students, or take action leading to institutionalization. Petitioners' retained attorney from Mobilization for Youth, Inc., a government funded anti-poverty program, was excluded from this proceeding pursuant to a regulation of the board of education which permits a student and his family to appear with an assistant of their choice as long as the assistant is not an attorney.

Have petitioners been denied due process of law in violation of the Fourteenth Amendment?

Constitutional Provisions, Statutory Provisions, and Regulations Involved

This petition involves the Fourteenth Amendment to the Constitution of the United States.

This petition also involves New York Education Law §§ 3212, 3214, and New York Family Court Act §§ 312, 332, which are printed in the Appendix, *infra*, pp. 55a-58a.

This case also involves New York City Board of Education General Circular No. 16 which is printed in Appendix C, *infra*, pp. 68a-77a.

Statement

For the main thrust of the attack on poverty on the lower East Side, New York City relies on Mobilization for Youth, Inc. (MFY). MFY is a government funded anti-poverty organization that attempts to provide comprehensive social services on a neighborhood basis. It employs lawyers, social workers, as well as other technical personnel, in a variety of educational and training programs to cope with the dilemmas of the community. MFY's Legal Services Unit is an integral part of the attempt to deal with the social ills the neighborhood faces.

To represent indigent clients, the Legal Services Unit has obtained the approval of the Legal Aid Committee of the Association of the Bar of the City of New York and the permission of the Appellate Division of the Supreme Court of New York, as required by Section 280 of the New York Penal Law. The unit has received funds from the Federal Government and the Ford Foundation. MFY

received its first grant to set up the Legal Services Unit from the federal Office of Juvenile Delinquency and Youth Development in November of 1963. The unit was in operation by January 1964. It is generally recognized that "[T]he Legal Services Unit was the first successful project of its kind in the country" and the precursor of, and the model for, the neighborhood legal services programs that were later to spring up under the auspices of the Office of Economic Opportunity.[1] The unit was a pioneer in the development of precedent-setting cases which affect large numbers of the indigent and its contributions have been significant in both criminal and civil areas. It has long been known for its concern for the rights of juveniles. For example, it put into operation the nation's first program providing representation for juveniles at the police precinct at the time of arrest.[2] As an important facet of its program, lawyers in the unit work with social workers in a co-ordinated effort to assist community people in resolving their problems.[3]

Manuela Madera, a Puerto Rican mother of four, lives in the MFY area. She does not speak or understand English. In early February, 1967 she and her husband Ramiro were notified by Miss Theresa Rakow, the District Superintendent of New York School District No. 1 that their 14 year old son, Victor, had been suspended from Public School 22, the junior high school in which he was enrolled. Victor was accused of striking a teacher, and was directed

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[1] Office of Juvenile Delinquency and Youth Development, U. S. Department of Health, Education and Welfare, "Neighborhood Legal Services—New Dimensions in the Law" (1966), p. 39.

[2] *Id.* at 38.

[3] *Ibid.*

to appear in Family Court on February 23, 1967 to answer a charge of juvenile delinquency and also to attend a district superintendent's "suspense" hearing or "guidance conference" on February 17, 1967.[4]

The Maderas retained attorneys from the Legal Services Unit of MFY to represent them at both the District Superintendent's hearing and the juvenile delinquency proceedings.[5] When an MFY attorney notified Miss Rakow's office that he would appear at the February 17th suspension hearing, on behalf of the Maderas, he was informed that he would not be permitted to do so pursuant to regulations of the board of education and the superintendent of schools—specifically, General Circular No. 16 (1965-1966) which provides that:

> Inasmuch as this is a guidance conference for the purpose of providing an opportunity for parents, teachers, counselors, supervisors, et al., to plan educationally for the benefit of the child, attorneys seeking to represent the parent or child may not participate (Circular No. 16, *infra*, p. 74a).

Circular No. 16 discusses two kinds of suspensions, the "principal suspense" (meaning by the principal of the school) and the "administrative suspense." Under the principal suspense the school principal can suspend a student from school for no more than five days. The administrative suspense involves more serious school problems and

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[4] A previous board of education Circular on school suspensions (Circular No. 11) had designated this a "suspense hearing". Circular No. 16 modified the name to "Guidance and Conference" but the change is "not substantive in nature". Exhibit A, Annexed to Amended Complaint.

[5] On February 28, 1967, the claim that Victor was a juvenile delinquent was dismissed by the Family Court, 267 F. Supp. at 359.

threatens long term interruption of a child's education. Deliberations and decisions involving administrative suspensions are carried on at a District Superintendent's office after referral by the school principal, and it was from a hearing to consider this latter form of suspension that the MFY attorney was barred. Petitioners have at no time challenged any aspect of the principal suspense as a normal incident of intraschool discipline. Such short term suspensions are no part of this case.

When it became clear that counsel would be barred from the hearing, petitioners' attorneys obtained a temporary restraining order in the district court prohibiting the school officials from proceeding with the hearing unless plaintiffs' counsel could be present and participate. Subsequently, the parties proceeded in the district court with a hearing on petitioners' motion for a preliminary injunction which was consolidated with the trial on the merits. The district court made extensive findings of fact as to the nature of the hearing and what was at stake for the pupil and parents involved, and permanently enjoined school officials from holding "administrative suspense" hearings from which attorneys were excluded.

The district court found that at the conclusion of the District Superintendent's hearing, the school authorities made decisions of very serious consequence for the child. The District Superintendent decides whether to return the student to the school in which he is enrolled, transfer him to another school, or require him to continue under suspension. Some students under suspension were deprived of schooling for as much as ten months. The court found that in many cases the indefinite prolonged suspensions resulting from the District Superintendent's hearing were the equivalent of expulsions, 267 F. Supp. at 369. School

records indicated that following a District Superintendent's hearing some students who were beyond the school leaving age were "discharged" or released by school authorities, Court's Exhibits 1-17.

In addition, the court found that the District Superintendent could have the pupil transferred to one of New York's special day schools for "socially maladjusted" children—popularly known as "600" schools because of their former numerical designations. The district court, on the basis of expert testimony, found that the "600" schools were an inferior, ethnically segregated class of schools and that a social stigma attached from placement in one of them. While under the New York statutory scheme a child cannot be placed in one of these special schools without parental "consent," the district court dismissed such consent as wholly illusory since the same New York statute also requires that should the parents refuse to give their consent in writing they "shall" be proceeded against for violating their statutory duty to see to the pupil's attendance at school, N. Y. Educ. Law §§ 3214-5(a), 3214-5(c).

In addition to these immediate dispositions at the conclusion of the hearing, the District Superintendent can make referrals of the pupil which have significant educational consequence. The Bureau of Child Guidance (BCG) may determine that a student requires medical suspension, home instruction or exemption from school attendance. The Bureau of Attendance to which a referral may also be made, may proceed with court action. "In the latter instance, school personnel will make themselves available for testimony in court" (Circular No. 16, *infra*, p. 75a).[6]

[6] Both the district court and court of appeals were dubious of the admissibility of any statements made at the hearing in a subsequent

Such referrals may result in institutional placement. The New York City Board of Education runs schools in a large number of residential institutions and hospitals and school officials have the authority to order a student found to be habitually truant, irregular in attendance, "insubordinate" or "disorderly" to be instructed "under confinement" for a period of up to two years, N. Y. Educ. Law §§ 3214-1; 3214-5a. As in the case of the "600" school, parents who refuse to accept the "recommendation" of institutional placement are faced with the threat of court action.[7] The district court found that these "serious consequences", made the exclusion of attorneys from a school suspension hearing a violation of the Due Process Clause of the Fourteenth Amendment. The court permanently enjoined school officials from enforcing the "no attorneys" provision in their regulation relating to the suspension of children attending public school.

On appeal, the court of appeals for the Second Circuit reversed, vacated the injunction, and dismissed the com-

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court proceeding. However, neither court doubted that the *disposition* of the guidance conference is admissible in a subsequent court action. Section 334 of the Family Court Act, cited by the court of appeals as barring statements made in a "preliminary conference" from an adjudicatory Family Court hearing or criminal action seems only to apply to a preliminary conference in the Family Court action, and has no reference to conferences of other agencies for other purposes—such as a school guidance conference. The district court based its doubt on admissibility upon *Garrity* v. *New Jersey*, 385 U. S. 493 (1967). What a Bureau of Attendance officer could validly report in a subsequent court action concerning the proceedings in a guidance conference is not clear.

[7] Adamant parents who refuse to consent and find themselves in Family Court defending a neglect charge do have the benefit of counsel and the airing of the issues in a judicial tribunal (Family Court Act, § 343). However, those parents who are intimidated by the threat of a neglect proceeding unwillingly "consent" to their child's institutional placement.

plaint. The appellate court did not share the view of the district court as to the seriousness of the consequences of the District Superintendent's hearing. It expressed the view that "the rules, regulations, procedures and practices disclosed on this record evince a high regard for the best interest and welfare of the child." The court was of the opinion that "law and order in the classroom should be the responsibility of our respective educational systems"; that due process of law does not require the presence of counsel; and that a social worker who is allowed to attend the hearing "would provide more adequate counsel to the child or parents than a lawyer," 386 F. 2d at 788.

How the Federal Question Was Raised and Decided Below

The question of whether in a school suspension hearing which threatened loss of liberty and the right to public education the parents and child involved were entitled to an assistant of their choice was raised throughout proceedings in the district court. 267 F. Supp. at 362. The district court decided that the "no attorneys" provision of board of education Circular No. 16 violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

On December 6, 1967, the United States Court of Appeals for the Second Circuit reversed the district court holding that the regulation of the board of education excluding attorneys did not violate the Due Process Clause of the Fourteenth Amendment. 386 F. 2d at 789.

REASONS FOR GRANTING THE WRIT

I.

The restriction on the role of the lawyer in this case raises an issue of national importance in that it severely impairs effective protection of the legal rights of the poor.

This case involves Victor Madera, a 14 year old Puerto Rican youth who was suspended from school for allegedly striking a teacher. He and his parents were summoned to appear before district school officials for a hearing to determine Victor's educational future. The family secured the assistance of an attorney with Mobilization for Youth, Inc., a neighborhood anti-poverty organization, but when the attorney sought to participate at the hearing he was informed that attorneys are excluded by board of education policy.

The question here is whether consistent with the Fourteenth Amendment Due Process Clause a board of education may bar an attorney from a proceeding at the school district level which will have profound consequences for the future of a public school student, although any non-attorney advisor may be present. The court of appeals upheld the exclusion of counsel because of what, petitioners submit, is a dangerous misconception of the lawyer's role and the nature of the proceeding at which his assistance was sought. Its decision is at odds with national efforts to provide the poor with legal resources necessary to protect their rights to procedural due process and their ability to obtain fair treatment from government officials.

Recent years have witnessed increased concern for the legal rights of the poor and a growing awareness of the need to provide legal services to enable them to protect themselves. This interest has been stimulated by and reflected in decisions of this court,[8] federal legislation,[9] national conferences,[10] and a burgeoning legal literature.[11] One of the most significant contributions to providing legal services for the poor has been the creation of local legal services projects under the federal Office of Economic Opportunity (OEO). The growth and proliferation of these neighborhood legal services projects evinces a strong national commitment to providing the poor with the resources necessary to cope with modern bureaucratic society.

This commitment reaches far beyond representation of the criminally accused. Indeed, federally funded legal ser-

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[8] *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Griffin* v. *Illinois*, 351 U. S. 12 (1956); and *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964); *NAACP* v. *Button*, 371 U. S. 415 (1963); *United Mine Workers of America, Dist. 12* v. *Illinois State Bar Association*, 389 U. S. 217 (1967).

[9] E.g., the Economic Opportunity Act of 1964, 78 Stat. 508, and the Criminal Justice Act of 1964, 78 Stat. 552, 18 U. S. C. § 3006 A.

[10] E.g., National Conference on Law and Poverty, Washington, D. C., June 23-25, 1965, under the Co-Sponsorship of the Attorney General and the Director of the Office of Economic Opportunity; The Extension of Legal Services to the Poor, Washington, D. C., November 12, 13, 14, 1964, under the Sponsorship of the U. S. Department of Health, Education and Welfare; National Conference on Bail and Criminal Justice, Washington, D. C., May 27-29, 1964 under the Co-Sponsorship of the U. S. Department of Justice and the Vera Foundation.

[11] See e.g., Symposium: Law of the Poor, 54 Calif. L. Rev. 319-1014 (1966); Bibliography of Selected Readings in Law and Poverty, in Conference Proceedings, National Conference on Law and Poverty (1965).

vice to the poor offices may not now handle criminal cases.[12] And, in fact, lack of legal protection in the criminal area constitutes only a small part of the vulnerability of the poor.[13]

Neighborhood lawyers serving the poor are taking on more than the traditional tasks of courtroom representation. They are instrumental in educating their clients to the fact that the machinery of government is intended for their use—that the law can work for the poor as well as against them.[14] They serve as negotiators for the commu-

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[12] §222 of Economic Opportunity amendments of 1967, 81 Stat. 672.

[13] As the Attorney General of the United States observed in 1964:

> In the final analysis, poverty is a condition of helplessness—of inability to cope with the conditions of existence in our complex society. We know something about that helplessness. The inability of a poor and uneducated person to defend himself unaided by counsel in a court of criminal justice is both symbolic and symptomatic of his larger helplessness.
>
> But we, as a profession, have backed away from dealing with that larger helplessness. We have secured the acquittal of an indigent person—but only to abandon him to eviction notices, wage attachments, repossession of goods and termination of welfare benefits . . . it is time to recognize that lawyers have a very special role to play in dealing with this helplessness. And it is time we filled it.
>
> Some of the necessary jobs are not very different from what lawyers have been doing all along for government, for business, for those who can pay and pay well.

Attorney General Robert F. Kennedy, Law Day Address, May 1, 1964, University of Chicago Law School, quoted in Cahn and Cahn, "The War on Poverty: A Civilian Perspective," 73 Yale L. J. 1317, 1336-1337 (1964).

[14] See generally Comment, "Neighborhood Law Offices: The New Wave in Legal Services for the Poor," 80 Harv. L. Rev. 805 (1967); Office of Economic Opportunity, The Poor Seek Justice (1967); Office of Economic Opportunity, First Annual Report of the Legal Services Program to the American Bar Association (1966); United States Department of Health, Education and Welfare, Conference Proceedings: The Extension of Legal Services to the Poor (1964); Office of Economic Opportunity, National Conference on Law and Poverty (1965).

nity with governmental agencies not merely in litigation, but on the administrative level with respect to welfare assistance, public housing, and myriad other public benefits.[15] The neighborhood lawyer performs functions which would not necessarily require a lawyer in educated middle class communities.[16]

The court of appeals rejected petitioners' demand to be represented in a serious matter by a neighborhood Legal Service attorney at an administrative hearing on the ground that the petitioners' best interests were not served by representation by an attorney. This ruling unjustifiably denigrates the role of all attorneys in providing the requisites of due process whether they represent rich or poor.

If a poor, non-English speaking person's right to be heard is to be at all effective it must include the right to be heard through an assistant of his own choosing. Petitioners do not claim that in every instance where a public benefit is put in jeopardy, the individual concerned is entitled to representation by counsel as a matter of constitutional right. This would be too rigid a response to a problem that must be approached by a variety of means serving a number of ends. But petitioners do claim that

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[15] See, Sparer, "The Welfare Client's Attorney," 12 U. C. L. A. L. Rev. 361 (1965); Carlin and Howard, "Legal Representation and Class Justice," 12 U. C. L. A. L. Rev. 381 (1965); Reich, "The New Property," 73 Yale L. J. 733 (1964); Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 Yale L. J. 1245 (1965); Handler, "Controlling Official Behavior in Welfare Administration," 54 Calif. L. Rev. 479 (1966).

[16] Often we are blinded to the efficacy of legal representation as a potential route to a desired result because other modes of communication, organization, pressure, and protest suffice—at least for the *middle class*. Cahn and Cahn, "The War on Poverty: A Civilian Perspective," 73 Yale L. J. 1317, 1344 (1964). (Emphasis supplied.)

when a citizen has someone available to assist him in dealing with public authorities, concerning matters of vital personal interest, that person should not be barred, as the board of education's regulation requires, solely because he happens to be a lawyer. It is an arbitrary and irrational distinction, which if given widespread application will seriously undermine the attempts now being made to enable the law to serve the poor as well as it serves the rich.

Some of the students indefinitely suspended as a result of the District Superintendent's hearing become dropouts, adding to the flood of unemployed indigent youth in our cities—and to the social problems attendant to such a flood. As former Secretary for Health, Education and Welfare Gardner has stated: "the schools have been all too willing to unload their behavior and scholastic problems on the community in the form of dropouts or expelled students." [17] In all these cases the child was faced with a system which denied him the assistance of counsel when faced with accusations by the established authorities.

Few rights could be of more importance to a maturing youth than his right to an education and thus the procedures which put this valuable right in jeopardy must comport with our fundamental notions of fairness.[18] Thus, although this petition raises only a narrow question of law, that question is of substantial public importance.

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[17] *Time*, January 20, 1967, p. 18.

[18] Increasingly, the city schools are becoming institutions for our poor and ethnic minorities, run by staffs that are middle class and white. On matters of group values and argot there are tremendous chasms of understanding. See, e.g., Kozol, Death at an Early Age; Kohl, 36 Children; Hentoff, Our Children Are Dying. The neighborhood lawyer, lately arrived as the tribune of the poor, can be of great value in bridging some of these chasms and establishing genuine communication. In some neighborhoods he may be the only one capable of doing so.

II.

Certiorari should be granted to decide whether due process of law is denied by a school suspension hearing from which the parents and child involved are denied the assistance of a person of their own choosing.

The district court and the court of appeals differed as to what due process requires. The divergence flows from disparate views as to the nature of the hearing held by school authorities and the seriousness of its consequences. To the court of appeals the hearings are innocuous "conferences"—preliminary investigations in which "[T]he most that is involved is a change of school assignment." 386 F. 2d at 783. Its view of the nature of the hearing is based in large part on an affidavit of the superintendent of schools.[19] The language of the affidavit is reminiscent of that of a pre-*In Re Gault*, 387 U. S. 1 (1967) description of the purposes and procedures of a juvenile court attempting to justify why due process should not apply.

In the *Gault* case this Court found that there was a definite "gap between rhetoric and reality" in the juvenile court system, 387 U. S. at 30. After observing and listening to extensive testimony from parents, social workers, and educational experts who had actually been involved in suspension hearings, the district court came to a similar

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[19] 386 F. 2d at 782. "The conference is conducted in an atmosphere of understanding and cooperation, in a joint effort involving the parent, the school, guidance personnel and community and religious agencies. There is never any element of the punitive, but rather an emphasis on finding a solution to the problem." Though he recites the theory of the "Guidance Conference" in detail, there is no indication in the record that the Superintendent of Schools has even ever attended a suspense hearing or "Guidance Conference."

conclusion about the harsh reality of New York City suspension hearings. Not only did the district court refuse to accept the benign description of the ambience and procedures put forward by school officials, but it differed with them as to the seriousness of the consequences of such hearings. As a direct result of the District Superintendent's conference a child may be returned to a regular public school setting or he may be suspended indefinitely. The district court found that some children are kept out of school the equivalent of an entire school year—or longer, 267 F. Supp. at 371. Despite the child's right to an education under New York law, in most cases of prolonged, indefinite suspension, there is no home instruction or alternative form of education offered by the school authorities. The youth who attains the school leaving age while on suspension and who was sceptical about the value of an education has little incentive to return to the classroom. Others who have passed the school leaving age are simply released or "discharged," by school officials. Under these circumstances, the district court properly viewed these prolonged indefinite suspensions as the "functional equivalent" of expulsion, 267 F. Supp. at 369.

Another direct consequence of the hearing is possible placement in a "600" school or "school for socially maladjusted children." To characterize this disposition as a mere "change of school assignment," as did the court of appeals, is unjustifiable in the face of both oral testimony and the written report of an educational expert, hired by the board itself to make a study of the "600" schools, to the effect that these schools are "ethnically segregated, inconveniently located, undersupported, organizationally unstable and unable to meet the needs of its student body." Dr. Bernard Mackler, "A Report on the '600' Schools: Di-

lemmas, Problems and Solutions," pp. 4-5. In short, as a consequence of a District Superintendent's hearing a child risks the educational disadvantage (as well as social stigma) that comes from placement in inferior schools operated for misfits. School officials must obtain parental consent before placing a child in such a special day school, N. Y. Education Law § 3214-5(a), but the statute also provides that should the parents fail to consent in writing, they "shall" be proceeded against for neglect, § 3214-5(c)(1). Such consent, as the district court found, is wholly illusory and lacks those elements of voluntariness recognized as "consent" in law. Cf., *Johnson* v. *Zerbst,* 304 U. S. 458 (1938).

Both the district court and the court of appeals agreed that these consequences result from the District Superintendent's hearing—they differed as to their seriousness. It is clear, therefore, that the hearing is not merely a preliminary investigatory procedure but rather an accusatory-adjudicatory proceeding in which, as required by Circular No. 16, "findings" and a "decision concerning the disposition of the case" are made. General Circular No. 16, *infra,* p. 75a.

As a result of the hearing or "guidance conference" the District Superintendent may also refer the student's case to the Bureau of Child Guidance or other agencies for study and recommendation, or to the Bureau of Attendance for court action. Such referrals to the BCG or related agencies may result in institutional placement. As in the case of the "600" school, parents who refuse to accept the "recommendation" of institutional placement are faced with the threat of court action, N. Y. Education Law §§ 3214-5(a); 3214-5(c). Parents who are coerced by this

threat find their children institutionalized without further opportunity for a hearing. There may be further investigations and decisions after a referral by the District Superintendent to the BCG, see 386 F. 2d at 785, but there is *no subsequent opportunity for a hearing.*[20] *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 152-53 (1941).

While the court of appeals concluded that the consequences of the hearing would be "limited" it conceded that "any action that would effectively deny an education must meet the minimal standards of due process" within the meaning of the Fourteenth Amendment. 386 F. 2d at 784. The court considered the question of whether due process permits exclusion of retained counsel on this basis and rejected petitioners' contention on the grounds that the right to representation is not an essential ingredient of a fair hearing.

If the Maderas' right to be heard is, however, to be more than a hollow formality, they must be permitted to be heard by and through an assistant of their own choosing—including the neighborhood lawyer. More than three decades ago, this Court observed, concerning both *civil* and criminal matters that

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated

[20] The only exception, of course, would be where the parent and child are proceeded against in Family Court for refusal to comply with board of education school requirements, in which case they would be assured of proper procedural safeguards including counsel, Family Court Act § 343.

Thus, contrary to the court of appeals' disclaimer (386 F. 2d at 788) the question of what due process requires before a child is expelled from school or sent to a special day or residential school was before the court.

> layman has small and sometimes no skill in the science of law . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Powell* v. *Alabama*, 287 U. S. 45, 68-69 (1932).

It is erroneous to conclude that the language of *Powell* is irrelevant, as did the court of appeals, because school suspension hearings do not involve "cases" or "courts." If a tribunal—no matter what it is called—is able to make factual findings, adjudicate issues, and impose serious disabilities then for purposes of aid to the uneducated layman, we have both a "case" and a "court." It is ironic that if the City of New York, or any other party, sued the Maderas for the smallest sum of money, no one would question their right to the assistance of retained counsel. New York Const. Art. I § 6.

The poor parents and child who leave the school setting and come to the bureaucratic headquarters downtown for a hearing are faced with a formidable array of authorities and experts, who know each other, speak well, are at ease in the hearing room, and who proceed to determine what is in their view best for the child's future on the basis of what is alleged to have been his conduct in the past. A rule excluding lawyers, while allowing all others, is not only arbitrary, capricious, and irrational in its classifica-

tion, but prevents parents and children from having the assistance of members of a profession especially well suited for dealing with this type of hearing. Lawyers have a special skill in being able to devise satisfactory resolutions when many competing values and interests are at stake—a skill which school officials concerned with the best welfare of a child should welcome.

The concern of the court of appeals that the mere presence of a lawyer in their midst would be destructive of the purposes of the hearing is ill-founded. Due process does not require a full scale judicial hearing. A lawyer at such hearings would be limited by reasonable rules established by the school authorities. But within this framework, the lawyer has a valuable contribution to make—certainly as much as the parents' social worker, priest, or other adviser, all of whom could have been present at the Madera hearing, while their lawyer would be barred. Should an attorney stray outside this framework, he would be subject to the same reasonable controls that the board could exercise over other types of advisers.

The opinion of the court of appeals denigrates the role of the lawyer. Not only does it unjustifiably elevate the effectiveness of the social worker over that of an attorney, but it suggests that a lawyer in this situation would be little more than a "destructive" pettifogger—quick with quibbles and legal niceties to clog the machinery of the hearing, but with little positive contribution to make. On the contrary, an attorney has the best interest of the child, his client, at heart—as much as do school officials. He is trained to seek creative ways to resolve the problems at hand, maximizing alternatives and offering suggestions that might not have occurred to the school authorities, but which

would be acceptable to all involved. This has been the experience of attorneys in other parts of New York State where there is no bar to attorney participation in school hearings, as was reported by an *amicus curiae* brief filed in the court of appeals by the Nassau County Legal Services Corporation, another O.E.O. Legal Services office which regularly represented children before school boards.

The mere presence of a lawyer would at the same time provide an assurance of regularity and fairness in the proceedings. The superintendent of schools in his affidavit filed with the answer to the complaint in this action expressed his opposition to the presence of an attorney as follows:

> "The attorney might assert that the improper acts of the pupil did not occur, or that the nature of the act has been exaggerated, or he might seek to establish extenuating circumstances." [21]

If appropriate and valid, all of these things an attorney might and *should* do. Objections to an attorney's presence cannot fairly be bottomed upon such considerations for the hearing officials are under an obligation to hear the child's version of the events and anything he has to say by way of explanation. The board's practice of assuming the correctness of the accumulation of reported incidents on the child's anecdotal record, see, 386 F. 2d at 788, does not "evince a high regard for the best interest and welfare of the child" 386 F. 2d at 789. If this evidence is important for the decision in the child's case, it should be subjected, within reasonable limits, to examination, criticism, and refutation. There is no irrebuttable presumption of accuracy attached to staff reports. Cf., *Kent* v. *United*

[21] Affidavit of Bernard E. Donovan, Superintendent of Schools.

States, 383 U. S. 541, 563 (1966); *Hannah* v. *Larche*, 363 U. S. 420, 489 (1960).

The authorities relied upon by the court of appeals do not support denial of counsel to petitioners. *In re Groban*, 352 U. S. 330 (1957) and *Anonymous* v. *Baker*, 360 U. S. 287 (1959) are inapposite. *Groban*, a 5-4 decision, held that a state could constitutionally deny a *witness* a right to counsel at an *investigatory* hearing. Application of this holding to the instant case is highly dubious since (1) the Maderas are not witnesses, but principals and (2) this is an adjudicatory, not an investigative hearing. Furthermore, the pillars which supported *Groban* have been removed for the objection to exclusion of counsel was that it impaired the privilege against self-incrimination. At the time the privilege was *not* protected against state action by the due process clause, *Malloy* v. *Hogan*, 378 U. S. 1 (1964).[22]

The court of appeals mistakenly read *Dixon* v. *Alabama Board of Education*, 294 F. 2d 150 (5th Cir. 1961), cert. denied, 368 U. S. 930 (1961), as supporting the exclusion of attorneys at a school expulsion hearing. *Dixon* discussed the procedural rights deemed necessary in such hearings

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[22] Nor should the draft board cases, *United States* v. *Sturgis*, 342 F. 2d 328 (3rd Cir. 1965); *Niznik* v. *United States*, 173 F. 2d 328 (6th Cir. 1949); *United States* v. *Pitt*, 144 F. 2d 169 (3rd Cir. 1944), cited by the court of appeals, 386 F. 2d at 787, be in anyway dispositive of the issues in this case. This Court has never passed upon the constitutionality of the Selective Service rule excluding counsel at draft board hearings. What is more, these hearings do not involve conduct that is cognizable in the criminal or juvenile courts or determinations that result in any immediate deprivation. Significantly, the Selective Service System provides registrants with legal advisors who, although they deal principally with appeals, are generally charged with assisting the registrant in the protection of his rights. Selective Service Regulation 1604.71 (d). There is no such analogue in the New York City school system.

but was silent on the question of the presence of counsel. It was concerned mainly with the issues of notice and the right to be heard. There is nothing in *Dixon* standards to indicate that a student exercising his right to be heard, would be barred from the assistance of an attorney of his own choosing at the hearing.[23]

We emphasize that to permit a lawyer under a rule that permits all other manner of advisors to be present and participate at the hearing at the District level is not to require one in all instances. The burden on the board of education of allowing a person to appear by counsel when one is available is nil. If denied the assistance of a neighborhood lawyer, however, the Maderas of our cities are at a serious disadvantage before administrative bodies. The New York City board of education regulation barring only attorneys from District school suspension hearings where valuable rights are in jeopardy is an arbitrary rule which prejudices the right to be heard guaranteed by the Due Process Clause of the Fourteenth Amendment.

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[23] The Second Circuit Court of Appeals has itself recognized that the presence of counsel "as an ingredient of fairness is a function of all other aspects of the hearing"—including the maturity and education of the individual involved. *Wasson* v. *Trowbridge*, 382 F. 2d 807, 812 (2d Cir. 1967).

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 502—September Term, 1966.

(Argued June 8, 1967 Decided December 6, 1967.)

Docket No. 31346

VICTOR MADERA, RAMIRO MADERA and MANUELA MADERA,

Plaintiffs-Appellees,

APPENDICES

BOARD OF EDUCATION OF THE CITY OF NEW YORK, BERNARD E. DONOVAN, as Superintendent of Schools of the City of New York, THERESA S. RAKOW, as District Superintendent for District One in the City of New York,

Defendants-Appellants.

Before:

MOORE, FRIENDLY and ANDERSON,

Circuit Judges.

Appeal from an order entered on April 13, 1967, in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, enjoining appellants from conducting a District Superintendent's Guidance Conference to consider the situation of a child suspended for disciplinary reasons without affording the child and his parents the right to be represented by legal counsel.